

NEZ PERCE TRIBAL EXECUTIVE COMMITTEE ET AL.

IBLA 91-46

Decided July 11, 1991

Appeal from a decision by the Area Manager, Cottonwood Resource Area, Bureau of Land Management, approving mine plan of operations SMP No. 90-01.

Set aside and remanded.

1. Environmental Policy Act -- Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements -- National Environmental Policy Act of 1969: Finding of No Significant Impact

The reasonableness of a FONSI will be upheld where the agency (1) has taken a hard look at the environmental consequences of the proposed action; (2) has identified relevant areas of environmental concern; and (3) has made a convincing case that the impact is insignificant, or (4) if there is significant impact, that changes in the project have sufficiently minimized such impact. When this does not occur, a FONSI cannot be upheld.

2. Environmental Policy Act -- Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements -- National Environmental Policy Act of 1969: Finding of No Significant Impact

When a FONSI is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required. A mitigation plan must be sufficiently developed and explained to provide a convincing case that significant environmental impacts will be reduced to insignificance. A FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for its finding, and it will be set aside and remanded.

APPEARANCES: Charles H. Hayes, Lapwai, Idaho, Chairman, Nez Perce Tribal Executive Committee; Roger Williams, Margaret Williams, Rae Ann Schuster-Loomis, and William L. Blevins, Elk City, Idaho, pro sese;

Michael D. Crapo, Esq., and Randall B. Reed, Esq., Idaho Falls, Idaho, for Idaho Gold Corporation, intervenor; Robert S. Burr, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Nez Perce Tribal Executive Committee (the Tribe), Roger Williams, Margaret Williams, Rae Ann Schuster-Loomis, and William L. Blevins (individual appellants) have appealed a decision record and finding of no significant impact (DR/FONSI) issued by the Area Manager, Cottonwood Resource Area, Bureau of Land Management (BLM), on August 30, 1990. The DR/FONSI approved a mine plan of operations submitted by Idaho Gold Corporation (Idaho Gold). 1/

A stay of operations has been requested by individual appellants (Feb. 11, 1991, Reply at 1) and by the Tribe (Tribe's Statement of Reasons (SOR) at 43). See 43 CFR 3809.4(f). Individual appellants have also requested expedited consideration (Feb. 11, 1991, Reply at 1). Both BLM and Idaho Gold oppose a stay of operations but do not object to expedited review (BLM Response of Mar. 25, 1991, at 1; Idaho Gold Answer at 33-34). We have expedited our consideration of this matter because there is a fundamental defect in BLM's finding of no significant impact.

Idaho Gold's plan of operations pertains to unpatented mining claims located in secs. 17, 20, and 21, T. 29 N., R. 8 E., Boise Meridian, near Elk City in Idaho County, Idaho. The proposal, known as the Buffalo Gulch Mine Project, is to mine approximately 5 million tons of gold-bearing ore and 7.5 million tons of overburden and waste rock from one pit and to separate the gold using cyanide heap leach recovery techniques. 2/ The project area covers approximately 200 acres and is located in the drainage basins of Buffalo Gulch Creek and Maurice Creek -- tributaries, respectively, of the American River and Whiskey Creek, which both flow into the South Fork of the Clearwater River. 3/

BLM's August 30, 1990, DR/FONSI reads in part:

Finding of No Significant Impacts: Based on the analysis of potential environmental impacts contained in the attached environmental assessment as amended, I have determined that impacts are not expected to be significant and an environmental impact statement is not required.

Rationale for Decision: The decision to allow the proposed action does not result in any undue or unnecessary environmental degradation and is in conformance with the Chief Joseph Management Framework Plan approved November 19, 1981.

(DR/FONSI at 1).

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1/ By order dated Dec. 10, 1990, we granted Idaho Gold's motion to intervene as a party.

2/ Environmental Assessment Number ID 060-90-05 (EA) at 2-1.

3/ EA at 1-1.

BLM employs the National Environmental Policy Act (NEPA) process to evaluate both whether a proposed mine plan of operations entails significant effects on the environment and whether mitigation measures are required to prevent unnecessary or undue degradation of the public lands. 43 CFR 3809.2-1. 4/ Of course, the consequences of the two determinations differ. The fact that a proposed mine plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects that would require preparation of an environmental impact statement. See Southwest Resource Council, 96 IBLA 105, 120-21, 94 I.D. 56, 64-65 (1987); 45 FR 78902, 78905 (Nov. 26, 1980). If there are significant environmental effects that cannot be mitigated, an EIS must be prepared even if there is no unnecessary or undue degradation of the public lands. 42 U.S.C. § 4332(2)(C) (1988). If there is unnecessary or undue degradation, it must be mitigated. See 43 CFR 3809.2-1(b). If unnecessary or undue degradation cannot be prevented by mitigating measures, BLM is required to deny approval of the plan. 43 CFR 3809.0-3(b); Department of the Navy, 108 IBLA 334, 336 (1989). See 43 U.S.C. § 1732(b) (1988); 43 CFR 3809.0-5(k).

4/ See BLM Instruction Memorandum No. 90-566 (IM), "Cyanide Management Policy for Activities Authorized under 43 CFR 3802/3809," dated Aug. 6, 1990, which sets forth policies, applicable to all new operations on public lands, "designed to promote consistent management practices to ensure that operations which use cyanide or other lethal solutions do not cause unnecessary or undue degradation of Federal lands" (BLM Answer, Exh. J). Attachment 1 of the IM, stating BLM's policy, provides in part: "4. The BLM shall use the NEPA process to evaluate all impacts of a proposed plan-level cyanide operation at an appropriate level of analysis and develop stipulations which will prevent unnecessary or undue degradation."

See also § 3809.21, BLM Manual:

"A. Environmental Documents Required. The approval of all plans requires an EA to identify the impacts of the proposed operation on the public land, develop mitigating measures or reclamation standards, and to determine if an environmental impact statement (EIS) is required. Any EA which recommends that an EIS be prepared must be reviewed and approved by the State Director.

\* \* \* \* \*

"C. Use of the EA to Develop Mitigating Measures. When an operator has not developed mitigating measures to prevent unnecessary or undue degradation or provided for reasonable reclamation in the proposed plan, the authorized officer must use the EA to develop reasonable reclamation or mitigating measures, as appropriate. Mitigating measures to prevent unnecessary or undue degradation will be developed during EA. The plan will be modified by adding these mitigating measures. If the modifications completely compensate for any adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects will not be crossed, and an EIS will not be required. (Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears, et al. v. R. Max Peterson, et al., 510 F. Supp. 1186 (D.D.C. 1981), affirmed, 685 F.2d 678 (D.C. C[ir]. 1982).)"

In this case BLM concluded, based on an environmental assessment, as amended, that environmental "impacts [were] not expected to be significant and an environmental impact statement [was] not required" and that the proposed mine project would not cause unnecessary or undue degradation of the public land. The decision noted that "[a]ll design features, environmental controls and mitigation measures included in the plan [of operations] and its amendments and the associated environmental assessment (EA) and its amendments \* \* \* are incorporated by reference." BLM concluded:

Although a number of commenters expressed the opinion that an environmental impact statement should be prepared for this project, I feel the environmental assessment as amended correctly indicates that no significant impacts will occur. I also feel that no additional information which would affect my decision on this proposal would be identified in an EIS.

(DR/FONSI at 2).

Appellants contend that BLM should have prepared an EIS. We recently summarized the law applicable to such appeals as follows:

It is also well established that the Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. G. Jon Roush, 112 IBLA 293 (1990); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 173-74 (1984). The record must establish that the FONSI was based on reasoned decision-making. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. G. Jon Roush, *supra* at 298; Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal. Red Thunder, Inc., 117 IBLA 167, 175, 97 I.D. 263, 267 (1990); G. Jon Roush, *supra* at 297-98.

Owen Severance, 118 IBLA 381, 392 (1991). *See also* Southern Utah Wilderness Alliance, 114 IBLA 326, 332 (1990); The Sierra Club, Inc., 107 IBLA 96, 105 (1989).

[1] The criteria for evaluating whether an agency may forego preparing an EIS are:

(1) whether the agency took a "hard look" at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance,

whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

Cabinet Mountains Wilderness v. Peterson, *supra* at 392.

[A]n EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action. If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required.

Id.

However, "an 'agency cannot \* \* \* avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.' \* \* \* The agency must supply a convincing statement of reasons why potential effects are insignificant." The Steamboaters v. F.E.R.C., 759 F.2d 1382, 1393 (9th Cir. 1985); *see also* Save the Yaak Committee v. Block, 840 F.2d 714, 717 (9th Cir. 1988). Similarly, we have said:

The reasonableness of a finding of no significant impact has been upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized such impact.

California Wilderness Coalition, 98 IBLA 314, 319 (1987); Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987); Tulkisarmute Native Community Council, 88 IBLA 210, 216 (1985); William E. Tucker, 82 IBLA 324, 327 (1984).

For all but one of the environmental concerns raised by appellants -- *e.g.*, cumulative impacts, noise, visual impact -- we find BLM conducted a careful review and came to a reasonable determination and that appellants' reasons for appeal do not demonstrate that BLM erred in law or fact or overlooked a substantial environmental problem of material significance. Rather, appellants' reasons indicate differences of opinion -- strongly held and well presented -- as to the significance of the impacts of the Buffalo Gulch Mine. As to the impact of the Buffalo Gulch Mine on fish habitat, however, we do not come to the same conclusion. BLM has not made a convincing case that the impact of the Buffalo Gulch Mine on fish habitat is insignificant or that changes proposed will render significant impacts insignificant. Indeed, it shares the concern about the impact but has not developed a plan to deal with it.

The November 19, 1981, Management Framework Plan Step 3 Decision Document (MFP) referred to in the DR/FONSI Rationale quoted above "contains

[the BLM District Manager's] decisions concerning land use allocations and basic resource management guidelines for the Chief Joseph Planning Unit of the Coeur d'Alene District." The MFP lists the Elk City Aquatic Zone as the highest priority intensive aquatic habitat management area, to be "intensively managed primarily as spawning and rearing areas for anadromous and resident fish." 5/ In December 1984, this part of the MFP was updated to read:

Aquatic habitat management will be accomplished by the development and initiation of Aquatic Zone HMPs [habitat management plans] within the Cottonwood Resource Area. Refer to Table 1 for a listing of streams and rivers, and the appropriate Aquatic Zones, identified for HMP development. Refer to Table 2 for a listing of stream enhancement measures which could be initiated on a specific creek, river or lake (subject to environmental assessment). The MFP Step 3 and Master Overlay No. 126 will be updated to include the changes as indicated above. This update document will be included in the Chief Joseph, MFP, Step 3 planning document. 6/

Table 1 lists, under the South Fork of the Clearwater River, Whiskey Creek and the American River and their tributaries, Maurice Creek and Buffalo Gulch Creek, in the Elk City Aquatic Zone.

The Elk City Aquatic Zone HMP, dated July 1982, includes all streams and rivers crossing BLM lands in T. 29 N., R. 8 E., Boise Meridian. It states:

The rivers, streams and associated riparian areas within the Elk Creek Aquatic Zone (ECAZ) area provide valuable habitat for salmonids (anadromous and resident) and terrestrial wildlife. The ECAZ provides spawning and rearing habitat for chinook salmon (Oncorhynchus tshawytscha) and steelhead trout (Salmo gairdneri). Past and present land uses including mining, road construction, logging, grazing, development and recreational use have resulted in varying degrees of degradation on [sic] fish habitat and riparian areas. The ECAZ provides excellent opportunities for improvement and maintenance of valuable fish habitat and riparian habitat. Refer to Table 1 for a list of the rivers and streams within the ECAZ.

(Elk City Aquatic Zone HMP at 3).

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5/ Part II.F.9., Aquatic Wildlife Habitat, MFP at II-77.

6/ Memorandum to Wayne Zinne, District Manager, and Lanny Wilson, Area Manager, from Craig Johnson, Fisheries Biologist, entitled "MFP Step 3 Update for Aquatic Habitat Management Areas," dated Dec. 11, 1984, at 2. For an earlier listing of stream enhancement measures, then referred to as potential habitat management actions, see Part II.D.7.a., MFP at II-35-II-36.

Table 1 of the HMP shows that 3.48 miles of Buffalo Gulch Creek's 6.7 miles cross BLM lands and all 2.35 miles of Maurice Creek cross BLM lands. Table 1 states that Buffalo Gulch Creek "[w]ill be primarily managed for resident fish species" (HMP at 4, Table 1, River and Streams with Fish Habitat, Elk City Aquatic Zone). Appendix II of the HMP, the Description of the Area Characteristics, lists brook trout, cutthroat trout, and rainbow trout as coldwater species in Buffalo Gulch Creek and those species plus steelhead trout and chinook salmon in Maurice Creek (HMP at 38, Appendix II, Table 2, Stream Status Summary for the ECAZ). <sup>7/</sup> Buffalo Gulch Creek's conflicting activities are livestock grazing, logging, roads, mining, and stream channel alterations; its limiting factors are lack of pools, silt, migration barriers, debris, steep gradient, lack of instream cover, and bank cutting. *Id.* Maurice Creek's conflicting activities are logging and roads, and its limiting factors are water flow, lack of pools, migration barriers, debris, and steep gradient. *Id.* Buffalo Gulch Creek's suitability for resident habitat is listed as "poor" for 3.04 miles of the miles it crosses BLM lands and "moderate" for 0.42 miles (HMP at 44, Appendix II, Table 5, Fish Habitat Suitability for the ECAZ-BLM Lands (Miles)). Its suitability as spawning habitat is "high" for 0.3 miles, "poor" for 0.19 miles, and "very poor" for 2.99 miles. Its suitability for rearing habitat is

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<sup>7/</sup> Steelhead trout and chinook salmon are anadromous species (HMP at 43, Appendix II, Table 4, Fish Species Found in the ECAZ). The HMP, Appendix II, states that anadromous species "have a high public interest and an important economic value" and that the chinook salmon is a candidate species for threatened or endangered status under the Endangered Species Act (HMP at 43, Appendix II). The EA states that the chinook salmon and the steelhead trout are regarded as a BLM "sensitive" species (EA at 4-65). The EA states:

"The South Fork of the Clearwater River is a critical upstream and downstream passage for anadromous fish including, spring chinook salmon and steelhead trout. American River provides important spawning and rearing habitat for anadromous fish. Whiskey Creek, Maurice Creek, and Buffalo Gulch Creek provide primarily rearing habitat for anadromous fish. These streams provide spawning habitat for steelhead trout. However, steep gradients, low flows and partial or full barriers limit spring chinook salmon spawning in these waters." (EA at 3-16).

The South Fork of the Clearwater River is also a tributary of the Snake River (EA at 1-2 (Figure 1.1-1), 3-3). After the EA was prepared and the DR/FONSI was issued, the National Marine Fisheries Service (NMFS) published notification that it had received petitions on June 7, 1990, to add spring, summer, and fall chinook salmon in the Snake River to the list of threatened and endangered species, and that the petitions presented substantial information indicating the listings may be warranted. 55 FR 37342 (Sept. 11, 1990). On June 27, 1991, the NMFS proposed to list the spring, summer, and fall chinook salmon as threatened species. 56 FR 29542, 29547 (June 27, 1991).

"moderate" for 1.3 miles and "poor" for 2.18 miles. Id. Maurice Creek's suitability for resident habitat and rearing habitat is listed as "poor" for all of the 2.35 miles it crosses BLM lands. For spawning habitat its suitability is "moderate" for 0.84 miles, "poor" for 0.6 miles, and "very poor" for 0.91 miles. Id. The HMP indicates that streambank planting, gabion installation, channel reconstruction, and dredge rehabilitation were planned for Buffalo Gulch Creek and barrier removal was planned for Maurice Creek (HMP at 6, Table 3, Elk City Aquatic Zone Habitat Management Plan Summary of Planned Activities).

The EA states:

Maurice Creek and Buffalo Gulch Creek substrate monitoring by the Bureau of Land Management indicates high past sediment levels. Embeddedness measurements range from 44 to 52 percent for Maurice Creek and 25 to 34 percent for Buffalo Gulch Creek. The BLM's Management Framework Plan has identified fishery objectives of 80 percent for Buffalo Gulch Creek and 70 percent for Maurice Creek (percent of habitat production potential). 8/

In its discussion of the impacts of the proposed project on surface water quality due to sediment, the EA reaches the following conclusion: "Although water quality objectives are being met, fishery objectives will not be met because existing embeddedness levels and impacts from the proposed mining project will further reduce fish production potential" (EA at 4-23). 9/

In the DR/FONSI BLM recognized the concern about the impact on fish habitats of the proposed project. The DR/FONSI states:

8/ EA at 3-16; see also Buffalo Gulch Mine Plan of Operations, Idaho County, Idaho, Vol. 3, Appendix R, at 31, 32.

9/ Similarly, in discussing impacts on wildlife, the EA states:

"BLM has estimated that overall, the fish production potential in Maurice Creek will decrease by approximately 3 to 5 percent.

\* \* \* \* \*

"BLM has estimated that fish production potential in Buffalo Gulch Creek, in reference to optimum condition (pristine) will decrease by about 4 to 6 percent as a result of the proposed project.

\* \* \* \* \*

"As noted previously, the Maurice Creek and Buffalo Gulch Creek drainages have been adversely affected by past land uses, including road construction, timber harvest, and mining. Consequently, although predicted sediment yields from the proposed mining project are within allowable limits, past land uses continue to prevent BLM fishery objectives from being met in these drainages." (EA at 4-62). See also Supplement to EA, August 1990, Public Comments, Response to Idaho Conservation League at 21, comment 60, and Agency Comments, Response to Nez Perce Tribe at 9, comment 34.



5. Many commenters expressed concerns over possible degradation of fish habitat. The BLM shares these concerns and is working with the applicant to jointly develop fish enhancement projects (off-site) to improve overall habitat values within the drainage. These will result in a net improvement over the current situation.

(DR/FONSI at 2). This statement reflects responses by BLM to comments on the EA. The NMFS noted that the EA suggested offsite sediment mitigation projects "to further reduce the existing off-site sediment loads in the Buffalo Gulch and Maurice Creek drainages," 10/ and commented that it was not a definite plan. "This needs to be developed in further detail and made a project mitigation requirement," NMFS concluded. BLM responded:

Idaho Gold Corporation has committed to participate in the development of an off-site sediment load reduction mitigation and fisheries habitat enhancement plan with the Bureau of Land Management (BLM). Idaho Gold Corporation is working with the BLM to identify and evaluate candidate sites, and determine the most appropriate time to conduct the selected project(s). Candidate project(s) will be those project(s) likely to provide a meaningful reduction in the sediment load in these streams, and an improvement to the anadromous fisheries habitat in these stream drainages. It is likely that consultation will be sought by the BLM from other agencies concerning these activities. 11/

(Supplement to EA, August 1990, Agency Comments, Response to NMFS, Comment 2). 12/

In Idaho Natural Resources Legal Foundation, Inc., 115 IBLA 88 (1990), the EA stated that removal of water by the proposed water pipeline "could reduce or even jeopardize the continued survival of redband trout" in a stretch of stream. In response, BLM's decision authorizing construction of the pipeline attached a stipulation that said an aquatic/riparian management plan would be prepared for the stream and agreed to by BLM and the Idaho Department of Fish and Game. We set aside BLM's decision, stating:

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10/ EA at 4-44.

11/ See also Plan of Operations, Buffalo Gulch Mine, Idaho County, Idaho, Volume 1, Section 5.4.1, at 5-4, and Volume 2, Appendix K, at 16. Consultation with NMFS appears advisable in view of its current concern with spring, summer, and fall chinook salmon, see note 7, supra, and with the Idaho Department of Fish and Game and the Nez Perce Tribe for similar reasons, see note 12, infra.

12/ See also Supplement to EA, August 1990, Public Comments, Response to Idaho Conservation League at 21, comment 60, Agency Comments, Response to Idaho Department of Fish and Game, comment 1, Response to Nez Perce Tribe at 9, comment 34.

A FONSI may be predicated on a finding that changes to or restrictions on a project will sufficiently minimize the environmental impact. \* \* \* However, in such circumstances, NEPA requires analysis of any proposed mitigation measures and how effective they would be in reducing the impact to insignificance. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 696-97 (9th Cir. 1986) [rev'd on other grounds, Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)]; see 40 CFR 1502.16(h). <sup>13/</sup> In the present case, we

<sup>13/</sup> We are aware of the recent developments in the law concerning the requirements for completeness of a mitigation plan for purposes of an adequate environmental impact statement, as distinguished from those for an environmental assessment. In Oregon Natural Resources Council v. Marsh, 832 F.2d 1489 (9th Cir. 1987), the U.S. District Court's conclusion that the supplemental EIS for the proposed Elk Creek Dam was adequate was reversed, *inter alia*, on the grounds that "the mitigation plan for wildlife [was] not yet fully developed. \* \* \* We fail to see how mitigation measures can be properly analyzed and their effectiveness explained when they have yet to be developed." 832 F.2d at 1493. The Court of Appeals quoted the plan as consisting of "a number of habitat manipulative techniques in conjunction with other land uses, landscaping at the project, and development of recreation sites. \* \* \* This compensation plan will be developed in coordination with Federal and state resource agencies." *Id.* The Court of Appeals criticized the failure of the plan to specify which of the listed habitat manipulative techniques or development measures would be used. "More important, there is no analysis of the mitigation measures listed, or any estimation of how effective the measures will be. \* \* \* [T]he EIS must analyze the mitigation measures in detail and explain the effectiveness of the measures. See [Northwest Indian Cemetery Protective Association v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986)]." *Id.* The Court of Appeals concluded:

"The importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluating the adequacy of an environmental impact statement. Without a complete mitigation plan, the decisionmaker is unable to make an informed judgment as to the environmental impact of the project -- one of the main purposes of an environmental impact statement." *Id.* at 1493-94.

Soon after the Marsh decision, the Court of Appeals held that NEPA imposed a duty on an agency that

"action be taken to mitigate the adverse effects of major federal actions." Stop H-3 Assn. v. Brinegar, 389 F. Supp. 1102, 1111 (D. Hawaii 1974), *rev'd on other grounds*, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976). \* \* \* Consequently, an EIS must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action. Oregon Natural Resources Council v. Marsh, 820 F.2d 1051, 1055 (9th Cir. 1987)." Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 819 (9th Cir. 1987). The Court of Appeals concluded its opinion by quoting the language from Marsh set forth above.

find this analysis to be lacking. \* \* \* [N]o details are provided about the management plan to be developed between BLM and the Idaho Department of Fish and Game. \* \* \* In the absence of any details regarding mitigation, there is no analysis upon which a FONSI may be predicated.

115 IBLA at 91.

In this case it is apparent that BLM made its finding of no significant impact partially in reliance on Idaho Gold's commitment to cooperate in developing an "off-site sediment load reduction mitigation and fisheries habitat enhancement plan." See note 11, supra, and accompanying text, and DR/FONSI at 2. However, the sites and the "appropriate time[s] to conduct the selected project(s)" were not known when the EA and the supplement to the EA were prepared or when the FONSI was made. Only a general criterion for the "candidate project(s)" was stated -- "those project(s) likely to provide a meaningful reduction in the sediment load in these streams, and an improvement to the anadromous fisheries habitat in these stream

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The Supreme Court reviewed both Marsh and Methow Valley. It held the Court of Appeals' holding in Marsh that the supplemental EIS "was defective because it did not include a complete mitigation plan" was "erroneous for the reasons stated in our opinion in Robertson v. Methow Valley Citizens Council," 490 U.S. 332 (1989). Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 369 (1989).

In Methow Valley the Supreme Court stated that "one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences." 490 U.S. at 351. "There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." Id. at 352.

The Supreme Court concluded:

"We thus conclude that the Court of Appeals erred, first, in assuming that 'NEPA requires that "action be taken to mitigate the adverse effects of major federal actions,"' 833 F.2d, at 819 (quoting Stop H-3 Assn. v. Brinegar, 389 F. Supp., at 1111), and, second, in finding that this substantive requirement entails the further duty to include in every EIS 'a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action,' 833 F.2d, at 819 (emphasis supplied)." Id. at 353.

The Supreme Court noted the United States Magistrate's conclusion that the Forest Service EIS involved in Methow Valley was adequate was based on a recognition that "mere listing \* \* \* is generally inadequate to satisfy the CEQ regulations" on mitigation and on a finding that "in this EIS there is more -- not much more -- but more than a mere listing of mitigation measures." Id. at 346.

drainages." <sup>14/</sup> The record does not indicate which, if any, of the planned actions listed in the July 1982 Elk City Aquatic Zone Habitat Management Plan <sup>15/</sup> may be included or what the relationship of that plan to the candidate projects is. As late as January 1991 it appears that the mitigation plan was still being developed. In response to the Tribe's criticism that the EA provided "virtually no information on the details of the BLM's proposed fishery mitigation measures" (SOR at 36), BLM responded:

IGC is currently assisting BLM in off-site fish habitat restoration in the American River. Initial efforts involve the transport of woody debris (root wads) and habitat rocks (1-3 feet in diameter), removed from the Buffalo Gulch Mine site (described in [plan of operations], page 4-2), to be used for restoration of 2 miles of the old dredged stream bottom.

(BLM Answer at 30).

[2] In this case, as in Idaho Natural Resources Legal Foundation, Inc., *supra*, there are no details about the plan to be developed between BLM and Idaho Gold to reduce sediment and enhance fish habitat by off-site mitigation measures. In the context of an environmental assessment, a mitigation plan must be sufficiently developed and explained to provide a convincing case that significant impacts will be reduced to insignificance. Tulkisarmute Native Community Council, *supra*. Without development of a mitigation plan to this extent, BLM is not able accurately to judge whether the impacts can be mitigated. <sup>16/</sup> Therefore, a FONSI made before a mitigation plan is developed to this extent is premature because there is no basis for the finding. Idaho Natural Resources Legal Foundation, Inc., *supra*. Until an off-site sediment load reduction and fisheries habitat enhancement plan is adequately developed, the measures it includes cannot be analyzed and their effectiveness cannot be appraised. Without such an appraisal it is not possible to know whether the plan will reduce the potentially significant impacts of the Buffalo Gulch Mine on fish habitats so they are not significant. A determination that the mitigation plan will adequately reduce the impacts on fish habitat is a prerequisite to a finding that these impacts are not significant. It is therefore appropriate to set aside BLM's decision and remand this case for the development and analysis of the plan to mitigate the impact of the Buffalo Gulch Mine on fish habitat. Idaho Natural Resources Legal Foundation, Inc., *supra* at 91; Rex Kipp, 115 IBLA 1, 3 (1990).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's

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<sup>14/</sup> Supplement to EA, August 1990, Agency Comments, Response to NMFS, Comment 2; *see* text accompanying note 11, *supra*.

<sup>15/</sup> Elk City Aquatic Zone HMP, July 1982, at 5.

<sup>16/</sup> Development of a mitigation plan to this extent also enables BLM to determine whether the proposed action conforms with the applicable management framework plan or resource management plan. *See* 43 CFR 1601.0-5; 43 CFR 1610.5-3(a); BLM Manual § 1617.32A.

August 30, 1990, decision approving the plan of operations is set aside and the case is remanded for action consistent with this opinion. 17/

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Will A. Irwin  
Administrative Judge

I concur:

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Bruce R. Harris  
Administrative Judge

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17/ Idaho Gold's Motion to Strike the Tribe's Mar. 13, 1991, letter to the U.S. Army Corps of Engineers concerning the wetlands mitigation plan is denied.

March 18, 1992

IBLA 91-46	:	EA ID-060-90-05
120 IBLA 34 (1991)	:	
	:	Mining Plan of Operations
NEZ PERCE TRIBAL EXECUTIVE	:	
COMMITTEE <u>ET AL.</u>	:	Petitions for Reconsideration
	:	Granted; Board Decision
	:	Vacated; BLM Decision
	:	Affirmed

### ORDER

The Bureau of Land Management (BLM) and the Idaho Gold Corporation have filed timely petitions for reconsideration of our decision in Nez Perce Tribal Executive Committee, 120 IBLA 34 (1991). See 43 CFR 4.403. In that decision we stated that it was "apparent that BLM made its finding of no significant impact partially in reliance on Idaho Gold's commitment to cooperate in developing an 'off-site sediment load reduction mitigation and fisheries habitat enhancement plan.'" 120 IBLA at 44. Because "no details about the plan to be developed between BLM and Idaho Gold to reduce sediment and enhance fish habitat by off-site mitigation measures" had been developed, we held the finding of no significant impact was "premature because there [was] no basis for the finding." Id. at 45. We set aside BLM's August 30, 1990, decision approving the plan of operations for the Buffalo Gulch Mine and remanded the case "for the development and analysis of the plan to mitigate the impact of the Buffalo Gulch Mine on fish habitat." Id.

In its petition and supporting affidavits BLM states that the off-site fish habitat enhancement and sediment reduction projects designed to implement the 1982 Elk City Aquatic Zone Habitat Management Plan that Idaho Gold has volunteered to assist BLM with are unrelated to the Buffalo Gulch Mine project and were not the basis for the FONSI.

The determination made in this EA [Environmental Assessment] that insignificant impacts would occur as a result of the implementation of the Buffalo Gulch Mining plan was based entirely on the design features presented in the plan. \* \* \* The Buffalo Gulch Mine Plan of Operations and EA described in detail the sediment control mitigation to be implemented on site during implementation of the plan of operations. \* \* \* These measures are discussed in detail in Appendix K to the POO [plan of operations], pages 5 through 28. The analysis of this mitigation[,] which includes extensive sediment impact modeling[,] indicates that fish production potentials may be reduced by 3%-6% in Buffalo Gulch and Maurice Creek as a result of the Buffalo Gulch Mine operation. The BLM concluded that these impacts were insignificant.

(BLM Petition at 3-4). Craig A. Johnson, BLM fisheries biologist in the Cottonwood Resource Area Headquarters, states in his affidavit:

120 IBLA 46A

I am the principal author and key BLM coordinating official for a Memorandum of Understanding (MOU), signed May 20, 1991, between the BLM and Idaho Gold Corporation concerning volunteer fish habitat work to be completed in the Elk City area. This MOU identified HMP [Habitat Management Plan] habitat improvement projects to be completed with assistance from Idaho Gold Corporation. None of these projects were [sic] considered as mitigation for the proposed Buffalo Gulch mine project. The Idaho Gold Corporation volunteer work was not considered in the Buffalo Gulch mine EA as mitigation and was not a factor in the decision record and FONSI.

(Craig A. Johnson Affidavit dated Sept. 6, 1991, at 2). See also Affidavit of Larry O. Wilson, Cottonwood Resource Area Manager, BLM, dated September 6, 1991.

Idaho Gold Corporation, in its petition, states:

[T]he findings of the BLM in the DR/FONSI [Decision Record/Finding of No Significant Impact] pertaining to fish habitat were not contingent upon any off-site mitigation efforts being undertaken by Idaho Gold Corporation. Idaho Gold Corporation had independently committed to participate in the development of an off-site sediment load reduction mitigation and fisheries habitat enhancement plan with the Bureau of Land Management. This effort, however, was not intended as mitigation for a significant impact on Maurice Creek or Buffalo Gulch Creek. The BLM already had determined from its sediment models that the impact of mining operations on the fish habitat of those creeks would be insignificant,

(Idaho Gold Petition at 2).

Our decision was based on a misunderstanding of comments in the EA and its supplement and in the Decision Record and FONSI itself. See 120 IBLA at 42. It is now apparent that the off-site sediment load reduction mitigation and fisheries habitat enhancement plan was not the basis for BLM's finding that the proposed Buffalo Gulch Mine plan of operations would not cause significant environmental impacts. The EA concluded that compliance by Idaho Gold Corporation with the sediment control and monitoring plan set forth in Appendix K of the plan of operations would effectively mitigate the sediment-related impacts of the project (EA at 4-44). A review of the plan of operations, appellants' reasons for concern on appeal about this conclusion in the EA, and BLM's response to those reasons persuades us that BLM's August 30, 1990, decision is also reasonable as to the impact on fish habitat.

Therefore, under the authority granted to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted, the Board's decision of July 11, 1991, setting

aside BLM's August 30, 1990, decision approving the mine plan of operations for the Buffalo Gulch Mine is vacated, and BLM's decision is affirmed.

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Will A Irwin  
Administrative Judge

I concur:

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Bruce R. Harris  
Administrative Judge

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